WHAT IS A SAFE PLACE TO WORK UNDER THE F.E.L.A.

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A railroad's duty to furnish its employees a reasonably safe place to work is nowhere found in the language of the Federal Employers' Liability Act.[1] The duty obtained at common law in employer-employee relationships generally[2] and it is from this source, by judicial decision that the doctrine has become an integral part of the FELA.[3] As with the question of negligence generally, fulfillment or breach of the duty is a federal question to be determined by federal decisions, unfettered by local rules of law. *Erie v. Tompkins*[4] in all its ramifications has no application.[5]

For thirty odd years, commencing with the passage of the present act in 1908, employee recovery under the FELA based upon the employer's failure to furnish a safe place to work was, in most instances, potentially restrained and often thwarted by the employer invoking a second judicially created rule, that of assumption of risk. That doctrine, where applicable, insulated the carrier from its own negligence by reason of the employee's continuance in employment. However, in 1939 the Act was amended[6] and "every vestige . . . of assumption of risk was obliterated from the law . . . ."[7] Today employer liability hangs on two questions, negligence and proximate cause, there being no remaining defense in bar as the act upon its passage abolished the fellow-servant rule and substituted comparative negligence for the strict rule of contributory negligence. Naturally with the 1939 Amendment the duty to furnish a reasonably safe place to work attained a vigor previously unknown.

With this background it will be the purpose of this article to analyze some of the more recent court decisions in an effort to determine what is a safe place to work within the Act in several of the more frequently arising factual situations.

CLEARANCE—STRUCTURES AND OBSTRUCTIONS

While the 1939 Amendment abolished in toto assumption of risk, some courts inaccurately have continued to pay lip service to the doctrine in situations of non-negligence. This confusion is graphically depicted in instances of close clearance which involve risks inherent in railroading. Thus, as recently as 1947, prejudicial error was found in a trial court's

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[1] 35 STAT. 65 (1908) (as amended) 45 U.S.C. §51 (1946).

[2] Choctaw, Oklahoma and Gulf R.R. v. McDade, 191 U.S. 64 (1903); Patton v. Texas and Pacific Ry., 179 U.S. 658 (1901); Union Pacific Ry. v. O'Brien, 161 U.S. 451 (1896).

[3] Bailey v. Central Vermont Ry., Inc., 319 U.S. 350 (1943).

[4] 304 U.S. 64 (1938).

[5] Urie v. Thompson, 337 U.S. 163 (1949).

[6] 53 STAT. 1404 (1939), 45 U.S.C. §54 (1946).

[7] Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943).

unqualified instruction that the plaintiff could not be held to have assumed the risk of his employment.[8] Although the doctrine was not made an issue in the pleadings and there was no basis for such an instruction, the reviewing court, nevertheless, was of the opinion, in spite of the 1939 Amendment, that assumption of risk remained as an affirmative defense to those dangers in employment "which are naturally inherent in the business and are not in whole or in part caused by or the result of defendant's negligence." At the risk of seeming overly exacting, it is submitted that the court erred in conceding that assumption of risk may be interjected in any form, however disguised. While it is true in a lay sense that the employee "assumes the risk" of hazards not due to negligence, there is no reason, in such situations, to invoke a defense which presupposes negligence where no negligence exists. Indeed, any instruction on assumption of risk is bound to create confusion and likely will be reversible error.[9] This distinction is frequently manifest in clearance cases where often structures of prescribed standards based on engineering practices are in issue.

A close clearance with its accompanying danger is not in itself sufficient to warrant a finding of negligence.[10] In fact, pre-1939 decisions have announced the rule that courts will not prescribe standards nor leave the location of permanent structures along a line of railroad, such as mail cranes, semaphores, switchstands and overhead bridges, which involve engineering questions, to the uncertain and varying judgment of juries.[11] These opinions recognize the practical concept that construction and maintenance of such structures with reference to the track of a railroad are management prerogatives to be decided in light of the convenient and economical use of the railroad and the accommodation of its traffic. Of course, it logically follows that those structures and conditions existing as part of such engineering scheme do not involve any question of negligence, in the absence of manifest errors in construction,

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[8] See Ellis v. Union Pacific R.R., 148 Neb. 515, 27 N.W. 2d 921 (1947). The ambiguity and confusion in the phrase "assumption of risk" is recognized by Mr. Justice Frankfurter in his concurring opinion to Tiller v. Atlantic Coast Line R.R., *supra,* note 7. See also Owens v. Union Pac. R.R., 319 U.S. 715, 720 (1943) where Mr. Justice Rutledge stated: "and assumption of risk took over also, in misguided appellation, large regions of the law of negligence. What in fact was absence from departure of due care by the defendant came to be labelled 'assumption of risk.'"

[9] Perrett v. Southern Pacific Co., 73 Cal. 2d 30, 165 P. 2d 751 (1946).

[10] Atlantic Coast Line R.R. v. Powe, 283 U.S. 401 (1931); Hall v. Chicago & N. W. Ry., 5 Ill. 2d 135, 125 N.E. 2d 77 (1955); Conkey v. New York Central R. R., 136 N.Y.S. 2d 189 (Sup. Ct. 1954).

[11] See, *e.g.,* Atlantic Coast Line R.R. v. Powe, *supra,* Note 10; Delaware, Lackawanna and Western R. R. v. Koske, 279 U.S. 7 (1929); Toledo, St. L. & W. R. R. v. Allen, 276 U.S. 165 (1928); Hylton v. Southern Ry., 87 F. 2d 393 (6th Cir. 1937); *cert. denied,* 301 U.S. 699 (1937); Chicago, M. & St. P. Ry. v. Riley, 145 Fed. 137 (7th Cir. 1906); Tennessee Central Ry. v. Shacklett, 24 Tenn. App. 563, 147 S.W. 2d 1054 (1941).

patent to an ordinary observer.[12] And, in spite of the 1939 Amendment and the apparent present disposition of the Supreme Court to allow all cases to go to the jury, there is respectable authority to the effect that these former decisions reflect the present state of the law.[13]

However, it would be folly to consider a legal principle which circumvents the jury function, separate and apart from recent Supreme Court decisions which have modified established precedents demarcating the role of judge and jury in making the vital dispositive determination of the presence or absence of negligence in cases arising under the FELA. For example, it is a rule of common law that where proved facts give equal support to each of two inconsistent inferences, judgment, as a matter of law, must go against the party upon whom rests the burden of proof.[14]

This rule was approved by the Supreme Court in *Pennsylvania R. R. v. Chamberlain*,[15] an action arising under the FELA, to recover damages for the death of a brakeman. Of controlling importance was evidence of a crash caused by a collision of cars in defendant's yard. This evidence supported both the inference that the string of cars the decedent was riding was in a collision and also that the collision occurred in a part of the yard remote from decedent's whereabouts. Under such circumstances, the court held:

> We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover.

Consider this principle in light of the recent case of *Lavender v. Kurn*[16] which involved the unwitnessed death of a switchtender in yards owned by the Illinois Central Railroad Company. There was no direct evidence as to how the deceased met his death. Furthermore, though evidence of the decedent's duties and certain physical facts as to the condition of the area in which he met his death was in dispute, the evidence as a whole taken most favorably to petitioner gave rise, it is submitted, to no more than speculation as to whether decedent was murdered or struck by a mail hook from a passing train. In delivering the opinion of the court Mr. Justice Murphy discloses ". . . there was evidence from which it might be inferred that the end of the mail hook struck Haney in

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[12] Chicago, M. & St. P. Ry. Co. v. Riley, *supra*, Note 11.

[13] Stewart v. Baltimore & Ohio R. R., 137 F. 2d 527 (2d Cir. 1943); Rashaw v. Central Vt. Ry., Inc., 133 F. 2d 253 (2d Cir. 1943); Finnegan v. Monongahela Connecting R. R., 378 Pa. 63, 108 A. 2d 321 (1954); Sprankle v. Thompson, 243 S. W. 2d 510 (Mo. 1951).

[14] White v. Lehigh Valley R.R., 220 N.Y. 131, 115 N.E. 439 (1917); McGrath v. St. Louis Transit Co., 197 Mo. 97, 94 S.W. 872 (1906).

[15] 288 U.S. 333 (1933).

[16] 327 U.S. 645 (1946).

the back of the head. . . ." Thereafter he adds ". . . there are facts from which it might reasonably be inferred that Haney was murdered." Having emphasized the reasonableness of drawing inconsistent inferences from the evidence, one supporting liability and the other non-liability, the opinion concludes:

> We hold, however, that there was sufficient evidence of negligence . . . to justify submission of the case to the jury . . . .
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> It is no answer to say the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference . . . . But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.

The language of the unanimous opinion in *Ellis v. Union Pacific R. R.*,[17] is further illustrative of the Supreme Court's apparent inclination to submit to the jury cases which at common law would have been decided for the defendant as a matter of law. This was an action for damages by an engine foreman who sustained personal injuries as a result of being crushed between a building and a moving railroad car. While the conflicting evidence most favorable to petitioner appears to justify a finding that petitioner was not furnished a safe place to work, the language of the court indicates that, even in instances where the facts are uncontroverted, so long as the evidence supports the inference drawn, the verdict may not be set aside although from such undisputed evidence other conflicting inferences equally consistent could have been made. Thus, the opinion states:

> the choice of conflicting versions of the way the accident happened, . . . *the inferences to be drawn from uncontroverted* as well as controverted *facts, are questions for the jury. . . . Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair minded men might reach a different conclusion.* For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. (Italics added)

Decisions such as *Lavender* and *Ellis* require a word of caution before assertion that any given factual situation will result in a verdict for defendant as a matter of law. Indeed, it is only reasonable that state and lower federal courts have accepted as a mandate the proposition that

[17] 329 U.S. 649 (1947). See also Gill v. Pennsylvania R. R., 201 F. 2d 718 (3d Cir. 1953), *cert. denied,* 346 U.S. 816 (1953), which recognizes the modification of common law principles in the Kurn and Ellis cases. Cf. Labonte v. New York, N.H. & H. R.R. 131 N.E. 2d 203 (Mass. 1956).

directed verdicts in favor of defendants in cases arising under the FELA are no longer tolerated. In the recent case of *Atlantic Coast Line R. R. v. Floyd*,[18] Judge Dobie, speaking for a unanimous court, had the following to say:

> The Supreme Court has made crystal clear its manifest unwillingness to sanction the taking of cases under the Federal Employers' Liability Act away from the jury by directed verdicts in favor of defendant railroads.

While it is true that a close clearance *per se* does not necessarily indicate negligence, it follows from the *Ellis* case, where in addition to close clearance, inadequate warning and deception were inferred, that a close clearance coupled with any superadded element will support an inference of negligence likely sufficient to take the case to the jury.[19] And, of course, if it can be shown that the structure or appliance was placed at or near railroad tracks when no practical necessity existed for the maintenance of the hazard at that location, close clearance *per se* spells negligence.[20]

Nor is the fact that the obstruction was constructed and maintained in accordance with the custom and usage of railroads generally or in accordance with the clearance specifications announced by the Association of American Railroads conclusive of the exercise of due care.[21] Likewise, the testimony of experts with respect to safer methods used on other railroads is admissible to produce an evidentiary basis for a jury finding that a safer method should have been used.[22] Further, despite the established principle that the standard of diligence is foresight, not hindsight, and the classic rule that negligence cannot be judged after the occurrence,[23] there is authority to the effect that, although a certain maneuver was being performed in the usual and customary manner, if further precautions "were possible" there is an evidentiary basis for a jury finding of negligence.[24] Similarly, evidence that fellow employees, for humani-

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[18] 227 F. 2d 820 (4th Cir. 1955).

[19] Stanczak v. Pennsylvania R. R., 174 F. 2d 43 (7th Cir. 1949); Beattie v. Monongahela Ry., 122 F. Supp. 893 (W. D. Pa. 1954); Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E. 2d 77 (1955).

[20] Rouse v. New York, C. & St. L. R. R., 349 Ill. App. 139, 110, N.E. 2d 266 (1953); James v. Atlantic Coast Line R.R., 199 S.C. 45, 18 S.E. 2d 616 (1942); Werner v. Illinois Central R. R., 309 Ill. App. 292, 33 N. E. 2d 121 (1941), *rev'd* on other grounds, 379 Ill. 559, 42 N.E. 2d 82 (1942).

[21] Rouse v. New York, C. & St. L. R. R., *supra*, Note 20; Bly v. Southern Ry., 183 Va. 162, 31 S.E. 2d 564 (1944), *aff'd.*, 183 Va. 406, 32 S.E. 2d 659 (1945). Cf. Lilly v. Grand Trunk Western R. Co., 317 U.S. 481 (1943).

[22] Margevich v. Chicago & N. W. Ry., 1 Ill. App. 2d 162, 116 N.E. 2d 914 (1953); *cert. denied*, 348 U.S. 861 (1954).

[23] SHERMAN AND REDFIELD, NEGLIGENCE, Section 24 (rev. ed. 1941); Southern Ry. v. Harpe, 223 Ind. 124, 58 N.E. 2d 346 (1944).

[24] Boston and Maine R. R. v. Meech, 156 F. 2d 109 (1st Cir. 1946), *cert. denied*, 329 U. S. 763, (1946). Cf. Williams v. Atlantic Coast Line R. R., 190 F. 2d 744 (5th Cir. 1951). Cf. Pitrowski v. New York, C & St. L. R.R., 4 Ill. 2d 125,

tarian reasons alone, customarily gave warning of a particular close clearance has been held sufficient to create a duty to warn notwithstanding the carrier contention that the law does not permit employees "to create a duty on each other without the knowledge and approval of the employer."[25]

Foreign Objects and Obstructions

A fruitful source of litigation under the FELA involves injuries to employees as a result of stepping, stumbling or slipping into, over or upon foreign objects or obstructions upon railroad premises. The decided cases in this field are myriad and extend the carrier's duty of care the length and breadth of its operations. Indeed, the continuing duty to furnish a reasonably safe place to work is not "relieved by the fact the employee's work at the place in question is fleeting or infrequent."[26] The one limiting factor lies in answer to the question whether the point of accident was a work-place, which is to be judged by foresight. For if the carrier had no reason to anticipate the injured employee would have occasion in the course of his duties to be in the area of injury, of course, there can be no duty in the above respect.[27]

Railroad property by its very nature and purpose contemplates the occasional presence of litter and foreign objects. As long as freight is hauled in open-top cars, and as long as railroad premises continue to attract trespassers, a lump of coal and debris of varied sorts will be found periodically along rights of way. Accordingly, it is generally held that the defendant must have knowledge of the hazard on its premises, either actual or constructive, to be guilty of negligence in failing to warn of or remove the danger. Typical of numerous decisions is *Waller v. Northern Pacific Co.*[28] There a switching crew foreman sought damages for personal injuries sustained while boarding a moving train at night as a result of slipping upon an unseen stick. The court, in reversing a judgment for the plaintiff, reaffirmed the general rule applicable to this type of litigation:

> The rule is firmly established that where plaintiff slips upon an object upon the premises of the defendant, plaintiff must, in order to establish liability, show that the defendant or his agent put the dangerous object there, or that they knew or by the

122 N.E. 2d 262 (Sup. Ct. 1954), aff'd., 6 Ill App. 2d 495, 128 N.E. 2d 577 (1955).

[25] Timmerman v. Terminal R. Ass'n. of St. Louis, 362 Mo. 280, 241 S.W. 2d 477 (1951).

[26] Bailey v. Central Vermont Ry., 319 U.S. 350 (1943).

[27] Kenney v. Boston and Maine R. R., 92 N.H. 495, 33 A. 2d 557 (1943). Cf. Pauly v. McCarthy, 166 P. 2d 501 (Utah 1946), *reversed,* 330 U.S. 802 (1947).

[28] 178 Ore. 274, 166 P. 2d 488 (1946). See also Webb v. Illinois Central R. R., 288 F. 2d 257 (7th Cir. 1955), *cert. granted,* 24 U.S.L. Week 3280 (U.S. April 23, 1956) (No. 741); Vironi v. Wheeling & Lake Erie Ry., 91 F. Supp. 854 (E.D. Ohio 1950).

> exercise of reasonable diligence could have known that it was there and failed to exercise diligence to remove it. (p. 498)

In application of this rule, proof of knowledge, either actual or constructive, on the part of the defendant is not essential in instances where an inference can be established that the obstruction negligently was placed on carrier premises by its employees or agents. And such an inference may arise where there is no evidence that licensees or strangers have access to defendant's premises and the hazard causing injury is a tool or object which is in proved general use by defendant's employees.[29] On the other hand, in the absence of negligence, even though it may be demonstrated that a foreign substance probably was deposited on defendant's premises through the agency of its employees or instrumentalities, proof of knowledge and opportunity to remove the danger remain essential to plaintiff's case.[30] However, the presence of a hole, having the appearance of being "worn down," in an otherwise hard, smooth surface maintained for the use of switchmen adjacent to a railroad track, will support an inference that the condition had been present sufficiently long to cast a duty upon the carrier to have discovered and remedied the peril.[31]

Another type of case in which the alleged defect causing injury has been brought about admittedly by defendant's employees, thereby satisfying any requirement of knowledge, is *Seaboard Air Line R. R. v. Gentry*.[32] Plaintiff complained of being thrown to the ground while boarding a moving caboose due to insecurely packed ballast. Of course, the only issue for determination was defendant's negligence and proximate cause. The court held, however, that the issue as to whether the ballast was properly placed and preserved was an engineering question which the courts generally trusted to experts. Thus, the allegations of the declaration were not sufficient to charge the defendant with negligence.[33]

In suits where it is unknown how the peril arose and there is evidence of trespassing in the area, the defendant's timely knowledge of the

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[29] Butz v. Union Pacific R. R., 120 Utah 185, 233 P. 2d 332 (1951); Clark v. Chicago & N. W. Ry., 226 Minn. 375, 33 N.W. 2d 484 (1948); Baltimore & Ohio R. R. v. Flechtner, 300 Fed. 318 (6th Cir. 1924). *Cf.* Missouri P. R. R. v. Zolliecoffer, 209 Ark. 559, 191 S. W. 2d 587 (1946).

[30] Texas & N. O. R. Co. v. Pool, 263 S.W. 2d 582 (Tex. 1953).

[31] Lofy v. Southern Pacific Co., 129 Cal. 2d 459, 277 P. 2d 423 (Dist. Ct. 1955); Cf. Hatfield v. Thompson, 252 S.W. 2d 534 (Mo. 1952) where it was admitted the hole had existed only "since the day before plaintiff was injured, and plaintiff does not contend its existence for that length of time would charge defendant with knowledge."

[32] 46 So. 2d 485 (Fla. 1950), *cert. denied*, 340 U.S. 853 (1950).

[33] Cf. Chicago, Rock Island & Pacific R. R. v. Gill, 217 F. 2d 195 (5th Cir. 1954) where there was evidence of no necessity for wooden runners, used for motor cars, to be elevated above brakeman's pathway and defendant failed to keep ballast filled in between runners. The issue of causation was held to be for the jury. See also Atlantic Coast Line R. R. v. Gunter, 229 F. 2d 842 (5 Cir. 1956).

hazard is a prerequisite to liability.[34] Moreover, in instances where testimony to the effect the obstruction was placed on defendant's premises by an outsider is uncontradicted, liability will ensue only if the defendant had actual or constructive knowledge of the hazard and sufficient time to remove it.[35] Of course, if there is no evidence as to how or when the danger arose, there is no basis for liability.[36] And as in negligence cases generally, conflicting evidence is for jury determination.[37]

No discussion of this phase of the FELA should fail to mention the recent decision of *Marcades v. New Orleans Terminal Co.*[38] This was an action for damages by a yard crew switchman who sustained injuries as a result of stepping down from a tank car onto "a large piece of brick or clinker," partially embedded in the ground. The court, after paying lip service to established principles, *i.e.*, the Act does not make the employer an insurer of the safety of its employees and the basis of liability is negligence, stated:

> An inference of negligence may be drawn from the fact that the brick or clinker on which plaintiff sprained his ankle was found in the walkway between the tracks where members of train crews would be expected to step on and off trains during switching operations.

This decision obviously imposes liability solely upon the existence of a foreign object, without regard to defendant's knowledge or opportunity to remove it. As such, despite the court's protestations, it makes the carrier an insurer of the employee's working place and provides for compensation without fault. The opinion disregards the established common law principle that the carrier remains entitled to a presumption of lack of knowledge of the hazard, even after proof of its existence.[39] Accordingly, it is submitted that this decision is antithetical to the many opinions on this subject and is entitled to no weight as precedent.[40]

The duty to furnish a reasonably safe place to work under the FELA is continuous and non-delegable and follows the master even though the servant is sent upon the premises of another to do his work.[41]

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[34] Waller v. Northern Pacific Terminal Co., 178 Ore. 274, 166 P. 2d 488 (1946).

[35] O'Brien v. Louisville & Nashville R. R., 360 Mo. 229, S.W. 2d 690 (1950).

[36] Thompson v. Thompson, 362 Mo. 73, 240 S. W. 2d 137 (1951). *Cf.* Loftin v. Howard, 82 So. 2d 125 (Fla. 1955).

[37] Vironi v. Wheeling & Lake Erie Ry., 91 F. Supp. 854 (E.D. Ohio 1950).

[38] 111 F. Supp. 650 (E.D. La. 1953).

[39] St. Louis, I. M. & R. R. v. Ingram, 124 Ark. 298, 187 S.W. 452 (1916), *aff'd. per curiam,* 244 U.S. 647 (1917); Hawkins v. Clinchfield R. R., 37 Tenn. App. 529, 266 S.W. 2d 840 (1953).

[40] See Webb v. Illinois Central R. R., 288 F. 2d 257 (7th Cir. 1955), *cert. granted,* 24 U.S.L. Week 3280 (U.S. April 23, 1956) (No. 741) which criticizes the opinion in Marcades v. New Orleans Terminal Co., 111 F. Supp. 650 (E. D. La. 1953).

[41] Terminal R. Ass'n. of St. Louis v. Fitzjohn, 165 F. 2d 473 (8th Cir 1948); Porter v. Terminal R. Ass'n. of St. Louis, 397 Ill. App. 645, 65 N. E. 2d 31 (1946).

The absence of ownership and lack of control over the premises on which the injury occurs does not absolve the defendant from liability, the theory being that the master should not require his employees to perform their duties at known dangerous places. Of course, once the duty of the master to furnish a reasonably safe place to work on third party premises has been established, the principles governing such cases are the same as if the injury occurred upon carrier owned and controlled property.[42]

Weather Conditions

As railroad companies by their nature extend over wide geographical areas and require, for efficiency of operations, extensive outside activity on the part of employees, it has become an accepted rule that carriers are not subject to liability for injuries resulting from temporary climatic conditions disconnected from other circumstances.[43] This principle acknowledges the carriers' lack of control over the vagaries of the weather and requires a degree of care no greater than the ability to perform. However, within the confines of railroad yards, which are constantly frequented by employees, the master is required to prevent a hazardous accumulation of snow and ice. In *Fort Worth and Denver City R. R. v. Smith*,[44] this obligation is summarized as follows:

> It is a general rule that a railway company is not liable to its employees for injuries resulting from climatic conditions, such as ice and snow; but within its yard limits it must exercise a degree of care commensurate with the risks to prevent the accumulation of snow and ice in such quantity, form, and location as to be a menace to the safety of its employees working in its yards.

Of course, the existence or non-existence of the duty varies with the factual situation. For instance, where a death occurred allegedly due to slipping on the sill step of a snow-covered gondola and the evidence disclosed a slight snowfall had ceased less than two hours prior to the accident, the court held no duty existed on the part of the railroad company to remove the snow from the area of the deceased's employment.[45] On the other hand, in an action for injuries sustained from a fall on ice near a switch in a busy section of defendant's yards, the icy condition having

[42] Kaminski v. Chicago River & Indiana R. R., 200 F. 2d 1 (7th Cir. 1952); Brock v. Gulf, Mobile & O. R. R., 270 S. W. 2d 827 (Mo. 1954); Hawkins v. Clinchfield R. R., 37 Tenn. App. 529, 266 S.W. 2d 840 (1953); Ericksen v. Southern Pacific Co., 39 Cal. 2d 374, 246 P. 2d 642 (1952), *cert. denied*, 344 U.S. 897 (1952); Butz v. Union Pacific R. R., 120 Utah 185, 233 P. 2d 332 (1951); Small v. Ralston-Purina Co., 202 S. W. 2d 533 (St. L. Ct. App. Mo. 1947).

[43] Raudenbush v. Baltimore and Ohio R. R., 160 F. 2d 363 (3rd Cir. 1947); McGivern v. Northern Pacific R. R., 132 F. 2d 213 (8th Cir. 1942).

[44] 206 F. 2d 667 (5th Cir. 1953). See also Anderson v. Elgin, Joliet and Eastern Ry., 227 F. 2d 91 (7th Cir. 1955); Detroit, T. & I. R. R. v. Banning, 173 F. 2d 752 (6th Cir. 1949), *cert. denied*, 338 U. S. 815 (1949); Kansas, Oklahoma & Gulf Ry. v. McAnally, 208 Okla. 497, 257 P. 2d 271 (1952).

[45] Raudenbush v. Baltimore and Ohio R. R., 160 F. 2d 363 (3d Cir. 1947)

been known to defendant over eight hours before the accident, it was held an issue for the jury whether the defendant was negligent in failing to take steps to remove the ice in spite of the apparently uncontradicted testimony that the storm was in progress at the time of the accident and any remedial steps would have been futile until it ceased.[46] Furthermore, if the carrier should have anticipated in advance a hazardous icy condition which could have been corrected by safeguards such as sand or salt, it is likely that such safeguards will be required.[47] Of course, outside the area of yards, a carrier has no duty to clear ice and snow from its right of way at points where the carrier could not anticipate an employee would be required to be in the course of his duties.[48]

Normally, an experienced employee assigned to work during adverse weather will be held to be the best judge of his own endurance.[49] However, once the master coerces continued exposure or proscribes protective measures, liability for injury from either uncommon cold[50] or unusual heat[51] likely will ensue. Also, prompt efforts to render assistance to employees perilously exposed to such elements, including medical attention where necessary, are required once such peril should have become apparent.[52]

Repairs

At common law it is established that the rule imposing liability on employers for not providing a safe place to work has only a modified application, if, indeed, any application to those cases where the employee who is injured is himself engaged to render a dangerous place safe. This principle is firmly embedded in the decisions construing the FELA either as an exception to the master's duty to furnish its servants a reasonably safe place to work or as an adaptation of that duty to a unique factual situation which results in a failure to give to such places the amount of safety the same degree of care would give to a permanent working place. A leading case in this field is *Houston's Adm'x. v. Seaboard Air Line Ry.*,[53] where it is stated:

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[46] Anderson v. Elgin, Joliet and Eastern Ry., 227 F. 2d 91 (7th Cir. 1955; cf. *Mirabile* v. New York Central R.R., 230 F. 2d 498 (2d Cir. 1956).

[47] Fugazzi v. Southern Pacific Co., 208 F. 2d 205 (9th Cir. 1953); Skidmore v. Baltimore and Ohio R. R., 167 F. 2d 54 (2d Cir. 1948), *cert. denied,* 335 U. S. 816 (1948).

[48] Burtis v. Freeman, 77 Col. 120, 235 Pac. 342 (1925).

[49] Gulf, C. & S. F. Ry. v. Waterhouse, 223 S.W. 2d 654 (Ct. Civ. App. Tex. 1949); Cf. Beamer v. Virginian Ry., 181 Va. 650, 26 S.E. 2d 43 (1943), *cert. denied,* 321 U.S. 763 (1944).

[50] O'Brien v. Chicago & N. W. Ry., 329 Ill. App. 382, 68 N. E. 2d 638 (1946). Cf. Heeb v. New York Central R. R., 325 Mich. 490, 39 N.W. 2d 44 (1949).

[51] Gulf, C. & S. F. Ry. v. Waterhouse, 223 S.W. 2d 654 (Ct. Civ. App. Tex. 1949).

[52] Anderson v. Atchison, T. & S. F. R. R., 333 U.S. 821 (1948); Szabo v. Pennsylvania R. R., 132 N.J.L. 331, 40 A. 2d 562 (Ct. Err. & App. N.J. 1945).

[53] 123 Va. 290, 96 S.E. 270 (Va. 1918). See also Payne v. Baltimore and Ohio

> The rule that it is the duty of the master to use ordinary care to provide a reasonably safe place in which the servant is to work does not generally apply where the servant is sent to make repairs in order to render the place safe.

Of course, if, inherent in the repair of dangerous places, there are latent dangers known to the master and unknown to the servant, the duty to warn becomes imperative.[54] Likewise, the presence of open and obvious hazards apparent alike to master and servant casts no such duty.[55]

Criminal Acts

A long line of decisions under the FELA deal with the carrier's duty to render its employees' working places safe from the intentional assaults or criminal acts of fellow employees. These decisions establish the principle that the master is liable for such conduct only when its employees acted within the scope of their employment and in furtherance of the employer's business.[56] Under this theory, liability of the master is vicarious in that the negligence of the offender must be imputed to the employer under the doctrine of *respondeat superior*. The decisions supporting this view have relied principally upon the leading decision of *Davis v. Green*[57] which involved the wanton and wilful killing of an employee by a fellow worker. A judgment for the plaintiff was reversed by the Supreme Court and Mr. Justice Holmes, speaking for the court, said:

> The ground on which the Railroad Company was held was that it had negligently employed a dangerous man with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and wilful act done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words that he did a wilful act

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R. R., 35 Ill. App. 186, 114 N.E. 2d 323 (1953); Pritchard v. Thompson, 348 Mo. 832, 156 S.W. 2d 652 (1941).

[54] Terminal R. Ass'n of St. Louis v. Howell, 165 F. 2d 135 (8th Cir. 1948); Pritchard v. Thompson, *supra*, Note 53.

[55] Cheffey v. Pennsylvania R. R., 79 F. Supp. 252 (E. D. Pa. 1948).

[56] Atlantic Coast Line R. R. v. Southwell, 275 U. S. 64 (1927); Hoyt v. Thompson, 174 F. 2d 284 (7th Cir. 1949); Sheaf v. Minneapolis, St. P. & S. S. M. R. R., 162 F. 2d 110 (8th Cir. 1947); Lanners v. Atchison, Topeka & S. F. Ry., 344 Ill. App. 123, 99 N.E. 2d 705 (1951); Young v. New York Central R. R., 88 Ohio App. 352, 88 N.E. 2d 220 (1949), *cert. denied*, 339 U. S. 986 (1950); Zoccano v. Long Island R. R., 298 N. Y. 553, 81 N.E. 2d 96 (1948); Osment v. Pitcairin, 349 Mo. 137, 159 S.W. 2d 666 (1941), *cert. denied*, 320 U. S. 792 (1943).

[57] 260 U.S. 349 (1922).

> wholly outside the scope of his employment while his employment was going on.

As recently as 1947 the Court of Appeals for the Eighth Circuit held that a complaint which alleged injuries as a result of an unprovoked attack by a fellow employee, known to have been quarrelsome and vicious for many years, did not, without more, state any genuine issue of negligence.[58] Indeed, there is logic in this conclusion as the statute imposes liability only for damages which result "in whole or in part from the negligence of . . . officers, agents, or employees" of the carrier. Certainly a criminal act prompted solely by personal malice and not performed in furtherance of the employer's business can hardly be said to be done in one's capacity as officer, agent or employee. Accordingly, under the more frequently occurring factual situations the carriers have in the past successfully defended claims of this type.

However, the recent Supreme Court decision of *Lillie v. Thompson*,[59] which has been the subject of conflicting interpretation in the lower courts, has brought about a re-examination of heretofore established principles. The case involved a brutal criminal assault by an outsider upon a 22-year-old female telegraph operator, who worked alone at night in a small shanty situated in an isolated part of defendant's railroad yards. The carrier had reason to know that the yards were frequented by dangerous characters but had failed to take protective measures for the plaintiff's safety. In reversing a judgment for defendant based upon the principle that the law does not permit recovery for the intentional or criminal acts of either a fellow employee or an outsider, the court stated:

> Petitioner alleged in effect that respondent was aware of conditions which created a likelihood that a young woman performing the duties required of petitioner would suffer just such an injury as was in fact inflicted upon her. That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it.

Whether this decision must "have limited application to cases of a similar factual nature"[60] or establishes a new concept of direct recovery—as distinguished from vicarious liability under the doctrine of *respondeat superior*—for the acts or omissions of the principal has not been settled.

However, no discussion of this subject should fail to mention the recent case of *Tatham v. Wabash R. R.*[61] There, in an action involving injuries sustained by plaintiff as the result of an assault by a fellow em-

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[58] Sheaf v. Minneapolis, St. P. & S. S. M. R. R., 162 F. 2d 110 (8th Cir. 1947).

[59] 332 U.S. 459 (1947).

[60] Young v. New York Central R. R., 88 Ohio App. 352, 88 N.E. 2d 220 (1949), *cert. denied*, 339 U.S. 986 (1950).

[61] 412 Ill. 568, 107 N.E. 2d 735 (1952). *Cf.* Kelly v. New York, N. H. & H. R. R., 138 F. Supp. 82 (D.C. Mass., 1956).

ployee, the complaint contained charges of negligence on two grounds, one based upon *respondeat superior* and the other upon the direct negligence of the master in knowingly employing a dangerous man to work with plaintiff, thereby creating the hazard which resulted in plaintiff's injuries. The court summarily disposed of the first ground, finding that the assault was not made within the scope of employment or in furtherance of the master's business. As to the second ground, the court, relying principally upon *Lillie v. Thompson, supra,* determined that the carrier is under a duty to protect its employees from foreseeable harm from fellow employees. After making a penetrating analysis of the *Davis* case, the court concluded that the issue of direct negligence was not before that court and the decision is no precedent for the restricted view that liability in this type action may be imposed only when the act was done in the scope of employment and in furtherance of the master's business.

The *Tatham* case represents another extension of the applicability of the FELA in one of the few remaining fields where coverage is of limited application. The decision presently is in conflict with other cases decided since *Lillie v. Thompson* and whether its interpretation of *Davis v. Green* is correct remains unsettled.[62]

Delegation of Employer Duty

A carrier's duty to furnish its employees a reasonably safe place to work under the FELA is continuing and as to its employees nondelegable.[63] Furthermore, Section 5[64] of the Act provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void.

However, carriers often contract with outside firms for the performance of various services, such as maintenance, repair or construction work. Moreover, the question frequently arises whether an employee of an outside company injured while engaged in his employer's work on behalf of a railroad in furtherance of interstate commerce may maintain a suit for damages against the carrier under the FELA for the latter's failure to furnish a reasonably safe place to work.

In instances where it can be shown that the carrier has engaged an independent contractor to perform services in order to evade the force and effect of the Act, such arrangement will be declared void and an action by the contractor's employee may be maintained against the carrier under the Act.[65] On the other hand, where no such intent can be shown

[62] For an interesting discussion of both views, the majority opinion following the "scope of employment" rule, see Amann v. Northern Pacific Ry., 292 P. 2d 753 (Mont. 1956).

[63] Brock v. Gulf, Mobile & O. R. R., 270 S.W. 2d 827 (Mo. 1954); Thompson v. Thompson, 362 Mo. 73, 227 S.W. 2d 690 (1950).

[64] 35 Stat. 66 (1908), 45 U.S.C., §55 (1946).

[65] Erie R. R. v. Marque, 23 F. 2d 664 (6th Cir. 1928); Moore v. Industrial Commission of Ohio, 49 Ohio App. 386, 197 N.E. 403 (1934).

and claimant's employer is a true independent contractor exercising unrestrained power of direction as well as exclusive control and supervision over the work performed, generally there will be no right of recovery against the railroad under the FELA.[66] In such instances the carrier, with respect to employees of a bona fide independent contractor, is under no duty to furnish a safe place to work.

Unquestionably there is a limit to the functions which may be delegated by a carrier to an independent contractor. Indeed, it has been held that carrier duties incident to the discharge of its function as a common carrier may not be assigned.[67] One recent decision, by way of dictum, has gone so far as to hold that a carrier may not escape liability under the FELA by assigning to an independent contractor "the ordinary and necessary maintenance work on track which it used in interstate commerce."[68] Notwithstanding, it is submitted that the more recent cases support the conclusion that a carrier may delegate to an independent contractor the duty of repair, maintenance and construction of its tracks, roadbed and appurtenances. Of course, whether there has been a *bona fide* delegation of duty will depend upon the facts peculiar to each case. However, both the repair and construction of a railroad bridge have been held assignable.[69] Similarly, a servant of an independent contractor, employed to clean out ditches, slope cuts, restore and widen banks and correct drainage along a carrier's right of way, was denied relief under the FELA over the contention that such repair, rehabilitation and improvement of the roadway and right of way of a railroad is in its nature non-delegable.[70] The same result has been reached where the independent contractor was employed to construct new and additional trackage.[71]

Miscellaneous

Under the vast body of law bearing upon the general duty of carriers to furnish employees a reasonably safe working place in cases arising under the FELA there are, of course, innumerable principles which have general application and are incapable of classification.

For example, it is established that where the place of work, ma-

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[66] Del Vecchio v. Pennsylvania R. R., 233 F. 2d (3d Cir. 1956). Dougall v. Spokane-Portland & S. Ry., 207 F. 2d 843 (9th Cir. 1953), *cert. denied,* 347 U. S. 904 (1954); Norman v. Spokane-Portland & S. Ry., 101 F. Supp. 350 (D.C. Ore. 1950); aff'd., 192 F. 2 d1020 (9th Cir. 1951), *cert. denied,* 342 U. S. 945 (1952).

[67] Atlantic Coast Line R. R. v. Treadway's Adm'x., 120 Va. 735, 93 S.E. 560 (1917), *cert. denied,* 245 U.S. 670 (1918).

[68] Miles v. Pennsylvania R. R., 182 F. 2d 411 (7th Cir. 1950).

[69] Norman v. Spokane-Portland & S. Ry., 101 F. Supp. 350 (D.C. Ore. 1950), *aff'd.,* 192 F. 2d 1020 (9th Cir. 1951), *cert. denied,* 342 U.S. 945 (1952); Tinsley v. Massman Construction Co., 270 S.W. 2d 835 (Mo. 1954); Lees v. Chicago & N. W. R. R., 339 Ill. App. 227, 89 N.E. 2d 418 (1950), *rev'd.* on other grounds, 409 Ill. 536, 100 N.E. 2d 653 (1951).

[70] Dougall v. Spokane-Portland & S. Ry., 207 F. 2d 843 (9th Cir. 1953), *cert. denied,* 347 U.S. 904 (1954).

[71] Miles v. Pennsylvania R. R., 182 F. 2d 411 (7th Cir. 1950).

chinery or appliances are reasonably safe for the purpose intended, a servant cannot hold the master liable for injuries resulting from their inappropriate, improper or unauthorized use.[72] The exception to this rule lies in those instances where the dangerous method or unsafe way have been chosen habitually to the knowledge of the carrier or such choice should have been anticipated. Under these circumstances the employer's failure to take adequate precautions to eliminate the dangerous practice or to render the unsafe condition reasonably safe will present a jury issue as to carrier negligence. Further, the employee's conduct in adopting the hazardous route or method of work will amount to no more than contributory negligence.[73]

While there appears no logical basis to distinguish *places* of work from the *manner* or *way* of doing work, the recent case of *Smith v. Southern Pacific Co.*[74] must be mentioned. There, the court impliedly held the employee's voluntary choice of a hazardous place as opposed to a safe place can, in no instance, amount to more than contributory negligence. The language of the opinion seemingly would reach this result even though the carrier had no knowledge of such choice in the past or any reason to anticipate such conduct. While the opinion does not delineate carrier negligence under such circumstances, it apparently is found in the mere availability of the dangerous *place.* To the contrary, under similar circumstances, the court holds the voluntary choice of a hazardous *manner* or *way* of doing work, where the risk of injury is obvious, amounts to sole negligence on the part of the employee and will be a defense in bar to any suit under the FELA. Of course, the qualification that the risk of injury must be obvious amounts to no more than finding that the claimant should have realized the danger involved and consequently the carrier had no reason to anticipate the hazardous choice. It is submitted that the voluntary choice of either a hazardous place or manner or way of work, without more, amounts to sole negligence and the *Smith* case insofar as it discusses places of work, which is dictum to the decision, is not in accord with the authorities on which it relies.

The master is under an affirmative duty to promulgate and enforce reasonable rules and regulations for the safety of employees.[75] Indeed, the failure to adopt and enforce safety rules in instances where such rules

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[72] Campbell v. Southern Pacific Co., 120 Ore. 122, 250 Pac. 622 (1926); Louisville & Nashville R. R. v. Parsons, 213 Ky. 432, 281 S. W. 519 (1926); McClain v. Seaboard Air Line Ry., 34 Ga. 86, 129 S.E. 876 (1925).

[73] Wilkerson v. McCarthy, 336 U.S. 53 (1949); Frizzell v. Wabash R. R., 199 F. 2d 153 (8th Cir. 1952), *cert. denied,* 344 U.S. 934 (1953); Virginian Ry. v. Viars, 193 F. 2d 547 (4th Cir. 1952); Hampton v. Pacific Electric Ry., 118 Cal. 2d 271, 257 P. 2d 703 (Dist. Ct. App. 1953).

[74] 292 P. 2d 66 (Dist. Ct. App., Cal. 1956).

[75] Lasagra v. McCarthy, 111 Utah 269, 177 P. 2d 734 (1947), *cert. denied,* 332 U.S. 829 (1947); New York Central R. R. v. Verpleatse, 116 Ind. App. 1, 59 N.E. 2d 916 (1945).

generally have been adopted by the industry may amout to negligence.[76] However, the mere promulgation of a rule does not necessarily take away from the jury the question whether the employer has exercised the degree of care legally required of it.[77] On the other hand, an employee's violation of a rule of general application prescribing broad precautionary conduct, at best, will amount to contributory negligence, if any negligence of the employer also contributes in part to the employee's injury.[78] To the contrary, there is authority to the effect that a servant's disregard of a specific order or positive instruction bars recovery even though the injury was due as well to the negligence of other employees of the carrier.[79]

Lastly, it is a rule of general application that the employee has the right to assume that the carrier has exercised reasonable care to provide him a safe place to work.[80] Furthermore, since the 1939 Amendment, even though the employee may know his employer has been negligent in furnishing a safe place to work, the employee will not be held to have assumed the risks of such danger. Indeed, to render the employer liable it is sufficient that he should have foreseen that his negligence would probably result in injury of some kind to some person. It is not necessary that the particular consequence or type injury be foreseen.[81]

CONCLUSION

The Supreme Court's manifest unwillingness, continuously evident in recent years, to permit directed verdicts to prevail in cases arising under the FELA has abridged the traditional function of trial judges in determining the presence or absence of negligence. Naturally, it has become increasingly difficult for the carrier to comply with its continuing duty to

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[76] Murray v. Atlantic Coast Line R .R., 233 F. 2d 215 (4th Cir. 1956). Schwer v. New York, C. & St. L. R. R., 161 Ohio St. 15, 117 N.E. 2d 696 (1954).

[77] Healy v. Pennsylvania R. R., 184 F. 2d 209 (3d Cir. 1950), *cert. denied,* 340 U.S. 935 (1951); Wright v. Chicago, Rock Island & P. R. R., 94 Neb. 317, 143 N.W. 220 (1913), *aff'd.,* 239 U.S. 548 (1916).

[78] Chicago & N. W. Ry. v. Garwood, 167 F. 2d 848 (8th Cir. 1948); Henwood v. Coburn, 165 F. 2d 418 (8th Cir. 1948).

[79] Chicago, St. P., M. & O. R. R. v. Arnold, 160 F. 2d 1002 (8th Cir. 1947); Norfolk and Western Ry. v. Riggs, 98 F. 2d 612 (6th Cir. 1938); Gildner v. Baltimore and Ohio R. R., 90 F. 2d 635 (2d Cir. 1937); Pere Marquette Ry. v. Haskins, 62 F. 2d 806 (6th Cir. 1933). Cf. Henwood v. Coburn, *supra,* Note 78.

The present efficacy of the principle that the violation of a specific rule or order by an injured employee is a defense in bar to his action for damages, despite concurring negligence of a fellow employee, has been questioned on the ground that such a violation amounts to assumption of risk, of course, repealed by the 1939 Amendment. See, *e.g.,* Northern Pacific Co., v. Mely, 219 F. 2d 199 (9th Cir. 1954); Johnson v. Chicago Great W. Ry., 242 Minn. 130, 64 N.W. 2d 372 (Minn. 1954).

[80] Williams v. Atlantic Coast Line R. R., 190 F. 2d 744 (5th Cir. 1951); Griswold v. Gardner, 155 F. 2d 333 (7th Cir. 1946), *cert. denied,* 329 U.S. 725 (1946).

[81] Virginian Ry. v. Viars, 193 F. 2d 547 (4th Cir. 1952); Stewart v. Baltimore & Ohio R. R., 137 F. 2d 527 (2d Cir. 1943).

furnish its employees a reasonably safe place to work under any factual situation, despite the innovation of every safety device and precaution modern technology permits within the bounds of practical railroad operation.

Indeed, the undermining of established common law concepts of negligence has rendered the Act an anachronism. As Justice Frankfurter recently stated:[82]

> I deplore this basis of liability because of the injustices and crudities inherent in applying the common law concepts of negligence to railroading. To fit the hazards of railroad employment into the requirements of a negligence action is to employ a wholly inappropriate procedure—a procedure adequate to the simple situations for which it was adapted but brutally unfit for the situations to which the Federal Employers' Liability Act requires that it be put. The result is a matter of common knowledge. Under the guise of suits of negligence, the distortions of the Act's application have turned it more and more into a workmen's compensation act. . . .

And, it might be added, there is one remaining essential, inherent in every workmen's compensation act, presently lacking in the FELA, that is, a limit to employer liability.

[82] Stone v. New York, C. & St. L. R. R., 344 U.S. 407 (1953) (dissenting opinion).